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Supreme Court, U.S.
FILED
99 - 15 JUN 2 8 1999
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No. 99-

IN THE

Supreme Court of the United States

RONALD H. BLACKLEY, Sr.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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June 28, 1999

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit's and the United States District Court for the District of Columbia's expansive view of Independent Counsel Smaltz's jurisdiction and his authority to ignore Department of Justice policy violates the requirements of the Ethics in Government Act, this Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), and separation of powers principles.

2. Whether the United States District Court for the District of Columbia's failure to instruct the jury that it must find that Mr. Blackley's failure to report checks on his 1993 financial disclosure form violated a legal duty to find him guilty of concealment under 18 U.S.C. § 1001 violates this Court's decisions in *United States v. Gaudin*, 515 U.S. 506 (1995), and *Richardson v. United States*, No. 97-8629, 1999 U.S. Lexis 3640 (1999).

3. Whether the sentencing court's eight level upward departure increasing Mr. Blackley's sentence for false statement offenses under the fraud guidelines from possible probation to 27-months imprisonment based upon Mr. Blackley's status as a public official violates the requirements of federal sentencing guidelines, the Sentencing Reform Act of 1984, and this Court's decision in *United States v. Koon*, 518 U.S. 81 (1996).

4. Whether the sentencing court's eight level upward departure increasing Mr. Blackley's sentence for false statement offenses under the fraud guidelines from possible probation to 27-months imprisonment when there was no monetary loss and no charge or proof of an illegal gratuity is unreasonable under *Williams v. United States*, 503 U.S. 193 (1992), and *United States v. Sun-Diamond*, 119 S. Ct. 1402 (1999).

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PETITION FOR A WRIT OF CERTIORARI

Ronald H. Blackley, Sr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming his conviction in the United States District Court for the District of Columbia of three counts of violating 18 U.S.C. § 1001 and his sentence of 27-months incarceration.

Mr. Blackley was chief of staff for former Secretary of Agriculture, Alphonso Michael Espy. He was prosecuted by the Espy Independent Counsel ("IC"), Donald Smaltz, for three counts of false statements relating to omissions of approximately $22,000 on his 1993 SF 278 Financial Disclosure Form and to statements about these omissions to agents for Department of Agriculture and Agency for International Development inspectors general.

IC Smaltz's jurisdictional mandate was narrowly confined to investigating whether Secretary Espy committed violations of law "relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture."

Congress specifically provided in the Ethics in Government Act ("the Act") that omission violations by public officials are to be dealt with administratively and civilly. The Department of Justice also has a written policy against prosecuting financial disclosure violations under 18 U.S.C. § 1001. IC Smaltz acknowledged that he pursued his investigation after the Justice Department declined to take any action against Mr. Blackley, and that he did so in an attempt to secure Mr. Blackley's cooperation against Secretary Espy.

The items alleged to have been omitted from Mr. Blackley's 1993 Financial Disclosure Form had no relationship to gifts to Espy. Nor did IC Smaltz ever charge Mr. Blackley with improperly receiving gifts. Prior to trial,

Mr. Blackley moved to dismiss the indictment on the grounds that the filed charges violated the Act and this Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), since they fell outside of IC Smaltz's jurisdictional mandate and were inconsistent with Department of Justice policy.

The District Court denied Mr. Blackley's motion and ruled, in effect, that there were virtually no limits on IC Smaltz's jurisdiction, and that IC Smaltz could treat Mr. Blackley differently than he had been, or would be, treated by the Justice Department.

During the trial, IC Smaltz introduced no evidence on what had to be or what was exempt from reporting requirements on Mr. Blackley's 1993 SF 278 Financial Disclosure Form. IC Smaltz did no more than introduce evidence that Mr. Blackley had received 11 checks in amounts ranging from $200 to $10,000 during 1993, and had not reported them on his 1993 form. It was also not until cross-examination that IC witnesses disclosed that Mr. Blackley had reported anticipated earnings of $27,550 on his initial 1992 Financial Disclosure Form for income "earned" but not yet "received" prior to his beginning work as Espy's chief of staff in January 1993.

At the conclusion of the trial, the District Court refused to instruct the jury as requested by Mr. Blackley that it could only find him guilty of omissions on his financial disclosure form if he had a legal duty to report the omitted items. Mr. Blackley was subsequently convicted by the jury on the three false statements counts.

The District Court inflicted further injustice on Mr. Blackley by sentencing him to 27-months imprisonment even though he was eligible for probation under the fraud guidelines. The District Court upwardly departed by *eight levels*, increasing Mr. Blackley's offense level of eight to 16,

because the District Court concluded that the Sentencing Commission did not take public official status into account when it drafted the fraud guidelines.

The affirmance by the Circuit of Mr. Blackley's conviction and sentence presents questions of fundamental importance. This Court, in *Morrison*, 487 U.S. 654, upheld the constitutionality of the Act only after concluding that the Act imposed significant constraints on the scope of an independent counsel's jurisdiction and required that public officials investigated under the Act not be singled out for disparate treatment. In fact, Mr. Blackley was singled out for disparate treatment in this case, not once, but twice. And this all began, in the words of Justice Scalia in his dissenting opinion in *Morrison*, because "[t]he mini-Executive that is the independent counsel . . . is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide." 487 U.S. at 732. Review is important not only to Mr. Blackley but to others who will not benefit from the sun-setting of the independent counsel statute in June 1999 because of actions already taken or to be taken against them by existing independent counsel.

Further, in light of this Court's decisions in *United States v. Gaudin*, 515 U.S. 506 (1995), and *Richardson v. United States*, No. 97-8629, 1999 U.S. Lexis 3640 (1999), this case raises important questions about the effect of the District Court's refusal to instruct the jury that there must be a legal duty to disclose omitted information in a false statements prosecution.

In affirming the conviction and sentence, the Circuit's opinion also raises significant questions about a sentencing court's authority to upwardly depart solely because of a person's status as a public official within the strictures of the

Sentencing Reform Act of 1994, the federal sentencing guidelines, and this Court's decision in *United States v. Koon*, 518 U.S. 81 (1996).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 167 F.3d 543 (D.C. Cir. 1999), and reprinted as Appendix A, *infra*, 1a-20a. The District Court's decision denying Mr. Blackley's pretrial motions to dismiss the unlawful prosecution of him is reported at 986 F. Supp. 607 (D.D.C. 1997), and is included as Appendix B, *infra*, 21a-40a. The United States District Court for the District of Columbia's judgment against Ronald H. Blackley, Sr., is reprinted as Appendix C, *infra*, 41a-48a. The March 31, 1999 order of the District of Columbia Circuit denying Mr. Blackley's timely petition for rehearing and suggestion for rehearing *en banc* is included as Appendix D, *infra*, 49a. The District Court's adoption of IC Smaltz's instructions and these jury instructions are reprinted as Appendix H, *infra*, 148a-164a. The District Court's sentence of Mr. Blackley is reprinted as Appendix I, *infra*, 165a-196a.

JURISDICTION

This Court's jurisdiction to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The District of Columbia Circuit issued its decision on January 26, 1999, and denied Mr. Blackley's timely petition for rehearing and suggestion for rehearing *en banc* on March 31, 1999. This petition has been filed within ninety days of the Circuit's denial of rehearing as required by Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

Title VI of the Ethics in Government Act of 1978, as amended, 28 U.S.C. §§ 591-599 is set forth as Appendix E, *infra*, 50a-109a. The Code of Federal Regulations, Title 5, Sections 2634.104, 2634.105, 2634.202, 2634.302, 2634.304, 2634.305, 2634.306, 2634.308, and 2634.309, is set forth as Appendix F, *infra*, 110a-134a. The United States Sentencing Guideline, § 2F1.1, is set forth as Appendix G, *infra* 135a-147a. Finally, relevant provisions of the Sentencing Reform Act of 1984, as included in the Sentencing Guidelines Manual (1997) is set forth as Appendix J, *infra*, 197a-219a.

STATEMENT OF THE CASE

Mr. Blackley, who was the chief of staff to Alphonso Michael Espy, former Secretary of Agriculture, for 13 months, was prosecuted by IC Smaltz under the independent counsel statute, the Ethics in Government Act ("the Act"), 28 U.S.C. §§ 591-599, relating to omissions from his 1993 SF 278 Financial Disclosure Form and to statements about those omissions to inspectors general of the Department of Agriculture ("USDA") and the Agency for International Development ("AID").

IC Smaltz's original mandate issued by the Special Division on September 9, 1994, was narrowly confined to investigating whether former Secretary Espy committed violations of law "relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture." The mandate also granted IC Smaltz authority to investigate and prosecute "other allegations or evidence of violations of any federal criminal law . . . by any organization or individual developed during the Independent Counsel's investigation [regarding Mr. Espy] and connected with or arising out of that investigation"

and offenses relating to the obstruction of the IC's investigation. The full extent of the language in the original mandate is found in the District of Columbia Circuit's opinion at appendix 7a-8a.[1]

The indictment returned on April 22, 1997, charged Mr. Blackley with three counts of making false statements relating to checks totaling approximately $22,000 received in 1993 from two friends and former business colleagues, Messrs. Fuller and Cochran. Count one of the indictment alleges that on June 28, 1994, Mr. Blackley knowingly and willfully failed to disclose to the USDA, the receipt of 11 checks ranging from $200 to $10,000, on his 1993 SF 278 Financial Disclosure Form.

Count two charged that Mr. Blackley provided false information to an agent of the USDA Inspector General about the source of his earnings in 1993 in a seven sentence portion of a several page sworn declaration. Count three charged that Mr. Blackley falsely told an AID Inspector General agent that he received no "remuneration" other than his government salary in 1993.

Prior to trial, Mr. Blackley moved to dismiss the indictment and argued that IC Smaltz exceeded his jurisdiction in obtaining the indictment against him because (1) the

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[1] IC Smaltz subsequently sought approval for a referral to investigate and prosecute Mr. Blackley. IC Smaltz's Application involved a completely different set of facts and a different crime than that charged. This additional referral, approved by the Special Division over the objection of the Attorney General, was narrowly defined and restricted to any violation of law related to an improper intervention by Secretary Espy or Mr. Blackley in the subsidy application, appeal or review process. The District of Columbia Circuit found that this referral did not provide the basis for the prosecution in this case and that the Indictment related to the September 1994 original mandate. Appendix 5a-6a.

charges were not "related to" the original mandate, and (2) the Act, 28 U.S.C. § 594(f)(1), requires the Office of Independent Counsel ("OIC") to adhere to Department of Justice ("DOJ") policy, which provides that criminal false statements charges should not be brought for SF 278 Financial Disclosure Form violations unless there is significant underlying wrongdoing.

District Judge Royce Lamberth denied Mr. Blackley's motion. *United States v. Blackley*, 986 F. Supp. 607 (D.D.C. 1997), Appendix B. The District Court held that it could "discern a reasonable, causal or logical connection" between the jurisdiction conferred on IC Smaltz and the charges filed because the indictment alleged that Mr. Blackley had received unreported checks from two persons who had business pending before the USDA within his purview. Appendix B, 31a. The District Court also held that it was inconsistent with the purposes of the Act to require an independent counsel to comply with DOJ policies that would prevent him from ensuring that public officials maintain the highest standard of ethical conduct. Appendix B, 31a-38a.

At trial, the government introduced evidence that Mr. Blackley or his wife received 11 checks during 1993 that were not reported on his 1993 Financial Disclosure Form. Ten of the 11 checks, totaling $21,025 of the $22,025 at issue, were written by Charles Fuller, the person to whom Mr. Blackley turned over his rice brokerage business in 1992, prior to leaving Mississippi to become Espy's chief of staff.

Government witnesses conceded that Mr. Blackley had reported possible estimated earnings from his rice brokerage business of approximately $27,550 on his initial 1992 Financial Disclosure form, filed in 1993 for the time period beginning six months prior to entering federal service and continuing to March 1993. Nov. 21, 1997 Tr. at 141. *See*

Deft's Exh. 5, 7. They further conceded that the financial disclosure form is complicated and that there may be confusion over whether income must be reported in the year in which is earned, when it is received, or both. Nov. 20, 1997 Tr. at 109, 124.

Mr. Fuller received subsidies from the USDA in 1993, but these had been fixed prior to the time Mr. Blackley began work at the USDA, and Mr. Fuller had no appeal or any other business pending at the USDA in 1993.

The only other check at issue was a $1,000 check written by Carolyn Cochran to Mr. Blackley's son, Ron Blackley, Jr., when he was a graduating high school senior. Before going to Washington in 1993, Mr. Blackley represented the Cochrans in an appeal of a preliminary decision to reduce the amount of the subsidy they had received for a number of years. The USDA had tentatively decided to reinstate the previous subsidy amount before Mr. Blackley joined the USDA in January 1993. On his first day of employment, Mr. Blackley met with J. Michael Kelly, USDA's ethics officer, and agreed in writing not to participate any further in the Cochrans' appeals process. The Cochrans' position was ultimately sustained by the USDA, and IC witnesses testified that the appeal was decided on the merits and without any improper intervention by Mr. Blackley. Nov. 21, 1997 Tr. at 48-49.

The government did not introduce any evidence at trial explaining why Mr. Blackley had to report any of the checks on his 1993 Financial Disclosure Form. The Act and related regulations provide a number of exceptions to reporting requirements, including loans of $10,000 or less, most gifts to dependents, and gifts of less than $250. 5 C.F.R. §§ 2634.304, 2634.305, 2634.309. The 11 checks received by Mr. Blackley in 1993 ranged from $200 to $10,000.

In summary, there was no evidence presented at trial that the approximately $22,000 in unreported checks had been received either from a person "with business pending with the USDA" or "whose business was under his [Mr. Blackley's] purview" or that these various checks were required to be reported under the provisions of the Act. Appendix I, 173a.

Following the trial, the District Court rejected Mr. Blackley's proposed instructions that a legal duty to disclose is a required element under the concealment clause under 18 U.S.C. § 1001.

The jury convicted Mr. Blackley of all three false statements counts. In his presentence report, the federal probation officer concluded that Mr. Blackley was eligible to a sentence of probation because there was no monetary loss to the government and his offense level was an eight under the fraud guideline, U.S.S.G. § 2F1.1 (a base offense level of six and two additional points for more than minimal planning).

The District Court adopted the probation officer's findings at the presentence hearing on March 13, 1998. The District Court then indicated, however, that it intended to upwardly depart eight levels because the fraud guidelines did not give adequate consideration to false statements by high level government officials, that payments were made by persons with matters pending before the USDA that fell within Mr. Blackley's purview, and that Mr. Blackley knew that it was improper for him to receive these monies. Appendix I, 184a. Mr. Blackley notified the District Court of his opposition to the eight level upward departure both at the presentence hearing and at the time of sentencing. The District Court did not change its findings from the presentence hearing, and on March 18, 1998, sentenced Mr. Blackley to imprisonment of 27 months, the highest possible sentence in the level 16 sentencing range, and three years of supervised

release. Appendix I, 196a. The Circuit Court affirmed the District Court's sentence and found that the eight level upward departure was within the District Court's broad discretion.

REASONS FOR GRANTING THE WRIT

I. The Office of Independent Counsel's Exercise of Jurisdiction to Prosecute Mr. Blackley For False Statements Charges Is Inconsistent with This Court's Opinion in Morrison v. Olson, 487 U.S. 654 (1988), and Violates the Requirements of the Ethics in Government Act and Separation of Powers Principles.

The prosecution of Mr. Blackley is extraordinary. The Circuit's opinion affirming the OIC's actions in this matter essentially ignores the strict limitations imposed on independent counsel jurisdiction by the Act and in this Court's decision in *Morrison*, 487 U.S. 654.

The Act has survived challenge because, consistent with congressional intent, it carefully restricts the extent to which independent counsel can evade the exclusive prerogatives of the Executive Branch to investigate and prosecute federal crimes. As this Court declared in *Morrison*, "[The Act gives] the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." 487 U.S. at 696.

Both prior to the enactment of the original Act in 1978, and in the deliberations over various amendments to it since, Congress has consistently reiterated the need to impose constraints upon the investigative and prosecutorial authority and jurisdiction of independent counsel. While independent counsel are authorized under the Act to pursue investigations and prosecutions "demonstrably related to" their mandate, any

assessment of prosecutorial jurisdiction must be undertaken with separation of powers limitations in mind.

The prosecution and indictment of Mr. Blackley by IC Smaltz and the Circuit's opinion condoning the OIC's prosecution and indictment violates both the Act and the principles enunciated in *Morrison* because: 1) the charges against Mr. Blackley are unrelated to the OIC's original mandate; and 2) the prosecution of Mr. Blackley is directly inconsistent with DOJ policy and the requirements of 28 U.S.C. § 594(f).

A. The indictment against Mr. Blackley fails to relate to the original mandate.

The Special Division's original mandate to IC Smaltz on September 9, 1994, was faithful to the principle of restricted delegation of federal prosecutorial power to an independent counsel. Investigation and prosecution were limited to violations by Secretary Espy of any federal criminal law "relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture."

The false statements charges relating to Mr. Blackley's failure to disclose certain amounts on his 1993 SF 278 Form are not related to improper gifts accepted by Secretary Espy, and therefore, are not related to the original mandate.

The District of Columbia Circuit's opinion tears the restricted notion of "relatedness" away from its separation of powers moorings in concluding that the charges against Mr. Blackley were "related to" the original mandate concerning Espy. The opinion first attaches significance to the fact that Mr. Blackley was Espy's chief of staff. The Circuit Court discusses the meaning of the word "relation" in the context of the relationship between Espy and Mr. Blackley, as opposed

to the crime that is the subject of the mandate. In fact, the opinion states that an independent counsel should be able "to pursue crimes by the original target's close associates in the field of activity under investigation, . . ." presumably without consideration as to whether the actual charge itself is related to the charge being investigated in the original mandate. Appendix A, 9a.

The opinion goes even further by stating that "just as a person is 'related' not only to his parents and children, but to grandchildren and grandparents, the fact that a crime is in some sense a verbal step or two away from the core crime cannot alone render it *un*related." Appendix A, 9a. The Circuit Court's expansive view of "relatedness" underscores why the Attorney General opposed IC Smaltz's request to the Special Division for an additional referral:

> [T]here would be no logical or principled limits on the jurisdiction of an independent counsel. He is simply granted a roving license to prosecute any individual whose path may have crossed that of the covered person—and all individuals in turn connected to that individual—in hope that if criminal charges can be brought, these individuals may have some relevant information that they can be persuaded to offer. A wide range of persons would thus be swept within the potential scope of an independent counsel's prosecutorial jurisdiction simply because they are friends, neighbors, family members or business acquaintances of the subject of the independent counsel's investigation.

Opp. of the United States to Application for Referral of Related Matters, filed February 20, 1996.

The Circuit Court also concluded that the false statements charges against Mr. Blackley are "related to" the original

mandate because (1) the money received by Mr. Blackley in 1993 that he failed to report on his SF 278 Form came from individuals who received subsidies, and (2) the DOJ "allows its attorneys to use prosecutions under § 1001 as a vehicle for pursuing public corruption crimes." Appendix A, 10a. Neither of these reasons explains how the charges against Mr. Blackley are "related to" the original mandate to investigate Espy's alleged receipt of gratuities. Mr. Blackley was not charged with receiving a gratuity and the fact that the individuals who wrote Mr. Blackley checks received subsidies from the USDA in 1993 has absolutely nothing to do with the charge that Espy received gratuities.[2]

For these reasons, the Circuit Court's reasoning that the indictment against Mr. Blackley was somehow related to the original mandate to investigate Espy is flawed. This Court defined "related to" in 28 U.S.C. § 594(e) of the Act by stating that the referral jurisdiction "must be demonstrably related to the factual circumstances that give rise to the Attorney General's investigation and request for the appointment of the Independent Counsel in the particular case." *Morrison*, 487 U.S. at 679.

In testimony before the House Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary on March 2, 1999, Deputy Attorney General Eric Holder opposed re-authorization of the independent counsel statute because of what he viewed as "an unduly expansive interpretation of what is a related matter, with the result that an Independent Counsel can be given jurisdiction to investigate the associates of a covered person for alleged crimes that have the most tangential relationship to the alleged crimes by the covered person." Statement of Deputy Attorney

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[2] Nor was Mr. Blackley charged with obstruction of justice, perjury, or any other crime arising out of the Espy investigation.

General Eric Holder at the Hearing of the House Subcommittee on Commercial and Administrative Law Considering Reauthorization of the Independent Counsel Law, March 2, 1999. Deputy Attorney General Holder cited this case as the illustration supporting the DOJ's concern that congressional intent is being ignored. *Id.*

This concern about the undue expansion of independent counsel jurisdiction was shared by a number of other witnesses at the reauthorization hearings, including another independent counsel, Kenneth Starr. Starr told the Committee that "[t]he statute seeks to shift responsibility for the rare investigation that raises a conflict, not for federal law enforcement in general. The strict limits on the Independent Counsel, moreover, were central to the Supreme Court's constitutional holding in *Morrison*. An Independent Counsel's investigation may be 'fuzzy at the borders,' as the D.C. Circuit said a few years ago, but there are borders. Constitutionally, there have to be." Statement of Kenneth Starr before the Senate Committee on Governmental Affairs Hearing on the Future of the Independent Counsel Act, April 14, 1999.

B. The OIC violated 28 U.S.C. § 594(f) by failing to follow DOJ policy.

IC Smaltz's decision to present this matter to the grand jury violated established DOJ policy against prosecuting alleged violations of financial disclosure requirements under 18 U.S.C. § 1001 "unless a nondisclosure conceals significant underlying wrongdoing." Campbell, John C. (Trial Attorney, Public Integrity Section, Criminal Division), "False Statements" Annotation, Vol. 9A Department of Justice Manual at 9-1938-123 (Supp. 1988). Under 28 U.S.C. § 594(f)(1) of the Act:

> An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws. To determine these policies . . . the independent counsel shall, except to the extent that doing so would be inconsistent with the purposes of this chapter, consult with the Department of Justice.

By IC Smaltz's own admission after trial, he undertook to investigate and prosecute Mr. Blackley even though the DOJ had previously declined prosecution of the matter. Interview with IC Smaltz by WGBH Frontline, a PBS Program (televised May 19, 1998). And he did so in an attempt to secure Mr. Blackley's cooperation against Secretary Espy.

This Court in *Morrison* upheld the constitutionality of the Act against separation of powers challenges, in part, because of the statutory requirement that independent counsel comply with DOJ policies:

> Finally, we do not think that the Act "impermissibly undermine[s]" the powers of the Executive Branch [citation omitted], or "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions." [citation omitted]. . . . The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by

> Justice Department policy unless it is not "possible" to do so.

487 U.S. at 695-96.

When Congress amended the Act in 1994 to strengthen this requirement even beyond the language quoted in *Morrison*, its intent in doing so was stated clearly:

> As amended, section 594(f) maintains the policy that Independent Counsel are expected to follow the same rules as the Department of Justice in their investigations and in making decisions on whether or not to seek indictments. This provision is designed to help ensure that an individual who is the subject of an Independent Counsel investigation will not be held to a higher standard or subject to stricter enforcement of the laws than other individuals.

H.R. Rpt. No. 103-224, 103rd Cong., 1st Sess. at 20 (1993). *See also* S. Rpt. No. 103-101, 103rd Cong., 1st Sess. at 32 (1993). In opposing re-authorization of the independent counsel statute, former Attorney General Benjamin R. Civiletti testified that the statute has failed to achieve its original purpose of providing equal justice to everyone, "regardless of one's high position in government or relationship to anyone in such a position." Statement of Benjamin R. Civiletti before the House Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, March 10, 1999.

The Circuit's opinion cavalierly dismisses the statutory requirement that an independent counsel follow DOJ policy by concluding that Mr. Blackley has no remedy under the Act even if IC Smaltz did violate DOJ policy and even if the DOJ had previously declined prosecution. If this holding is permitted to stand, it undercuts the determination by this

Court in *Morrison* that the requirement that an independent counsel comply with DOJ policy is a critical factor in upholding the constitutionality of the statute.

In his opposition to Mr. Blackley's Emergency Motion to Stay the Mandate, IC Smaltz argued against a stay because it was "highly unlikely that the Supreme Court will devote part of its limited docket to a statute that might well not exist in its present form before the matter can be heard." Opp. at 4. This cynical view, expressed by an independent counsel who has been subject to great criticism for abusing his powers, suggests that this Court will ignore the abuses that have led to the demise of the independent counsel law, in effect, providing no justice to Mr. Blackley and others who are caught up in existing independent counsel investigations and prosecutions.[3] This Court should review this case because of the significance given in *Morrison* to the requirement that independent counsel comply with DOJ policy.

II. The United States District Court for the District of Columbia's Failure to Instruct the Jury that It Must Find That Mr. Blackley's Failure to Report Various Checks He Received Violated a Legal Duty in Order to Find Him Guilty of Concealment Under 18 U.S.C. § 1001 Violates This Court's Decisions in United States v. Gaudin, 515 U.S. 506 (1995), and Richardson v. United States, No. 97-8629, 1999 U.S. Lexis 3640 (1999).

The District Court's failure to instruct the jury as to the elements of 18 U.S.C. § 1001 and the Circuit Court's decision upholding this failure violate this Court's decisions requiring that every element of a crime of which a defendant

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[3] This Court has already rejected IC Smaltz's notion that a person can be convicted under the gratuity statute without any showing beyond the fact that a gratuity was given because of the recipient's official position. *United States v. Sun-Diamond*, 119 S. Ct. 1402 (1999).

is charged be properly submitted to a jury. *See Richardson v. United States*, No. 97-8629, 1999 U.S. Lexis 3640 (1999); *United States v. Gaudin*, 515 U.S. 506 (1995). Mr. Blackley's proposed instructions set out the statute under which he was charged (18 U.S.C. § 1001), the various clauses (concealment and false representation) establishing culpability under that statute, and the elements of each clause. The District Court rejected these instructions, and thus, failed to articulate the requirements for charges under 18 U.S.C. § 1001. The District Court's instructions failed to distinguish between the false representation and concealment clauses. In particular, the instructions did not instruct the jury that to find Mr. Blackley guilty under the concealment clause, the jury must find that he had a legal duty to disclose.

For a false statements count to be properly pled under the concealment clause, the majority of Circuits hold that a defendant must have had a duty to disclose the specific information. *See, e.g., United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994); *United States v. Zalman*, 870 F.2d 1047, 1055 (6th Cir. 1989), *cert. denied sub nom., Sharifinassab v. United States*, 492 U.S. 921 (1989); *United States v. Nersesian*, 824 F.2d 1294, 1312 (2d Cir. 1987), *cert. denied*, 484 U.S. 958 (1987); *United States v. Murphy*, 809 F.2d 1427, 1431 (9th Cir. 1987); *United States v. Hernando Ospina*, 798 F.2d 1570, 1578 (11th Cir. 1986); *United States v. Larson*, 796 F.2d 244, 246 (8th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676, 683 (1st Cir. 1985); *United States v. Irwin*, 654 F.2d 671, 678-79 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). *See also United States v. Crop Growers Corp.*, 954 F. Supp. 335, 344 (D.D.C. 1997). The rationale of these courts is based on due process concerns. "[W]here a statute or regulation imposes no duty whatever to disclose information, due process concerns require that

criminal liability not be based on omission of such information." *Crop Growers Corp.*, 954 F. Supp. at 345.

The jury in this case was not told that to find Mr. Blackley guilty under the concealment clause, it had to find that Mr. Blackley's failure to report one or more of the 11 checks violated a legal duty. Despite the fact that the existence of a legal duty is an element of the crime, the jury in this case was not instructed that compliance with the legal duties set out in the 1993 SF 278 Form was the standard against which it was to evaluate Mr. Blackley's failure to report each of the 11 checks.

The Circuit Court stated that since this Court's decision in *Gaudin*, 515 U.S. 506, it is uncertain whether the judicially created requirement of proving that a defendant has a legal duty to disclose needs to be presented to the jury or is a legal question to be decided by the court. Appendix A, 16a. This Court has held, however, that the "Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Gaudin*, 515 U.S. at 522-23. The Circuit Court conceded that some Circuits have determined that an element of the concealment clause of 18 U.S.C. § 1001 is that the defendant have a legal duty to disclose and there is no authority to the contrary. *See* Appendix A, 16a.

As this Court recently confirmed in *Richardson*, to determine that such a requirement, that is, a legal duty to disclose, is an element of the concealment clause of 18 U.S.C. § 1001 "is consistent with a tradition of requiring jury unanimity where the issue is whether a defendant has engaged in conduct that violates the law." No. 97-8629, 1999 U.S. Lexis 3640, at *11. Moreover, similar to the statute that this Court considered in *Richardson*, the breadth of the false statements statute, including its various means of violation,

"aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." *Id.* at *12-13. For this reason, the District Court's failure to instruct the jury concerning the element of legal duty in this matter was error just as the lower court's failure to instruct the jury in *Richardson* that it must unanimously agree not only that the defendant committed some "continuing series of violations," but also about which specific "violations" make up that "continuing series" was error. *Id.* Following this Court's reasoning in *Richardson*, the jury in this matter should have been instructed to focus on each particular clause of the false statements statute and its particular elements, not just the statute as a whole.

The Circuit Court also assumed that even if it was error to fail to instruct the jury concerning whether Mr. Blackley had a duty to disclose, the jury could have found Mr. Blackley guilty of concealment. Appendix A, 17a. The Circuit Court assumes that this is the case because the jury was instructed as to Mr. Blackley's theory that he did not believe that he was required to disclose the information he allegedly concealed. *Id.* Consideration of Mr. Blackley's theory of defense, however, is not a justification for the District Court's failure to properly instruct the jury as a matter of law. Mr. Blackley's theory of defense was based on lack of intent to violate the statute, not whether he had a duty to disclose.

In addition, the District Court's error was not harmless because the Circuit Court could not have concluded beyond a reasonable doubt that the jury verdict would have been the same absent the error. *See Neder v. United States*, No. 97-1985, 1999 U.S. Lexis 4007 (1999). The Circuit Court stated that "even if there was error in not submitting the duty-to-

disclose instruction to the jury, it is unimaginable that the jury could have found Blackley guilty of concealment in count one without first finding a duty to disclose." Appendix A, 17a. This conclusion is without merit because, unlike the evidence presented in *Neder*, the OIC presented no evidence that Mr. Blackley had a duty to disclose any of the checks he received in 1993 on his SF 278 Form.[4] Thus, there is no basis to assume that the jury considered that Mr. Blackley had a duty to disclose when it considered the matter and found him guilty of the charges.

For these reasons, the Circuit Court's opinion affirming the lower court's jury instructions in this matter should be reviewed by this Court because the decision is inconsistent with this Court's case law and due process requirements.

III. The Sentencing Court's Eight Level Upward Departure Increasing a Sentence for False Statements Under the Fraud Guidelines from Possible Probation to 27-Months Imprisonment Based Upon Mr. Blackley's Status as a Public Official Violates the Requirements of Federal Sentencing Guidelines, the Sentencing Reform Act of 1984, and This Court's Decision in United States v. Koon, 518 U.S. 81 (1996).

To ensure conformity with the guidelines sentencing structure and the Sentencing Reform Act of 1984, the Sentencing Commission severely restricted the use of upward departures to only those situations where "there exists an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing

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[4] The OIC failed to prove beyond a reasonable doubt that Mr. Blackley had a duty to disclose the payments listed in count one of the indictment on his 1993 SF 278 Form. *See Chiarella v. United States*, 445 U.S. 222 (1980). There was no evidence offered at trial concerning the false statements charges other than the 11 checks.

Commission in formulating the guidelines." 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0. As a result, upward departures are exceedingly rare. *See United States v. Dyce*, 91 F.3d 1462, 1466 (D.C. Cir.), *cert. denied*, 519 U.S. 1018 (1996) (". . . [W]e underscore what is implicit in the word "extraordinary" and explicit in the Guidelines themselves: departures on such a basis should be rare.").

This Court confirmed the strict limitations imposed on departures in *Koon*, 518 U.S. 81, and stated that a district court "must bear in mind the [Sentencing] Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'" *Id.* at 96. While giving due deference to the district courts' application of guidelines to the facts, this Court instructed appellate courts to determine that "discretion was not guided by erroneous legal conclusions" as part of their review of departure decisions. *Id.* at 100.

In upholding the District Court's eight level upward departure against Mr. Blackley, the Circuit Court ignored the restrictive standards imposed by *Koon* and simply concluded that the departure was "well within the broad discretion allowed the district court in such matters." Appendix A, 19a. In so doing, the Circuit Court has effectively eviscerated the Sentencing Commission's benchmark principle that such departures should be rarely utilized. U.S.S.G. § 5K2.0 (Commentary).

At the presentence hearing on March 13, 1998, the District Court stated: "I agree that there was no direct loss in this case, but the defendant was a high level government official who failed to disclose that he received at least $20,000 from people who had matters pending before the Department of Agriculture that fell within his purview." Appendix I, 173a. Counsel for Mr. Blackley told the court at the sentencing

hearing on March 18 that the court erred in its finding that Mr. Fuller, the person responsible for all but $1,000, had business pending before the USDA:

> [In my memorandum to the court,] I tried to convey, and obviously you've heard this from me before, Your Honor, that although we in no way diminish the amount of $20,000, as we have tried to point out, virtually all of this money came from Charles Fuller, who had, in effect, no business pending before the Department of Agriculture about which any decision could be made.

Appendix I, 177a. Further, as noted previously, the Cochran appeal was not within Mr. Blackley's "purview."

In response, the District Court said:

> Well, I find that the defendant clearly continued to receive monies from businesspeople from whom the Department of Agriculture provided subsidies during his employment at USDA, although he was informed that he was not allowed to receive such payments. The defendant not only received them, but he also lied about the fact that he received them. Moreover, the defendant was in a high government position as Chief of Staff to the Secretary of Agriculture when he received these monies. I find that this is a factor not considered in the fraud section of the guidelines. Contrary to the defendant, I don't think the Commission ever made a deliberate decision not to include this factor; I think they didn't deal with it at all, and, in this court's view, an eight-level upward departure is appropriate.

Appendix I, 184a. The District Court never explained why it believed Mr. Blackley was not allowed to receive the

payments he did. Mr. Blackley was not charged with improperly receiving payments. The charges (and all the evidence) related solely to Mr. Blackley's failure to disclose that he had received payments.

The District Court's primary justification for its upward departure was that "false statements by high level government officials are not adequately taken into account by the guidelines, . . ." Appendix I, 173a. The Circuit Court misinterpreted Sentencing Commission requirements and Supreme Court case law and overlooked the proper allocation of responsibilities between the Sentencing Commission and the courts in affirming the District Court's conclusion. As stated by this Court in *Koon*, sentencing policy resides in the Sentencing Commission and not in the courts. 518 U.S. at 108.

The sentencing court determined that high government officials should receive upward departures for fraud guideline offenses simply because of their status. Both the District Court and the Circuit Court concluded that there can be an upward departure for this reason because the Sentencing Commission never reached the question. As the District Court stated, "the sentence is an upward departure based on the defendant's position as a high government official, a fact not considered by the fraud section of the guidelines." Appendix I, 196a. This decision, if allowed to stand, establishes a sentencing policy that permits district courts to treat public officials differently under the fraud guidelines than anyone else. Such a policy decision is not one for the District Court to make. In *Koon*, this Court said that allowing a district court to decide whether a particular factor should always or never be taken into account transgresses the policy-making authority vested in the Commission. 518 U.S. at 106-07.

Indeed, the Circuit Court and the District Court further erred in concluding that the Commission did not take the matter of offender status as a public official into account when it fashioned the fraud guidelines. As the Court in *Koon* found, "[i]f a factor is unmentioned in the Guidelines, the court must, after considering the 'structure and theory of both relevant individual guidelines *and the Guidelines taken as a whole*,' decide whether it is sufficient to take the case out of the Guideline's heartland." *Id.* at 96 (emphasis added). In reviewing the guidelines as a whole, it is apparent that the Sentencing Commission gave careful and thorough consideration to a defendant's position as a government official as a broad policy matter.

Consideration of public officials' status is found throughout the guidelines. *See, e.g.*, U.S.S.G. §§ 2C1.1, 2C1.2, 2C1.7, 2H1.1. The Circuit Court decided that the Sentencing Commission only included the high level government official factor for those offenses where its occurrence is "salient." Appendix A, 19a. Even assuming this is true, it proves the point being made here. The Sentencing Commission authorized adjustments or departures for public officials only in those situations where the misconduct was directly pertinent to their official duties or where there were other strong policy reasons for doing so. As an illustration, the Commission mandated an increase of six levels if an offense involving abuses of individual rights was committed by a defendant who was a public official at the time he or she committed the offense. *See* U.S.S.G. § 2H1.1. This was a policy decision made by the Commission. It could also have concluded as a matter of policy that defendants convicted of making false statements can or must be subject to adjustments or upward departures if they were public officials at the time the statements were made. But the Commission decided not to do so, and a district court does not have co-extensive

authority to fashion such a policy in the absence of Sentencing Commission action.

The District Court's "dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range." U.S.S.G. § 5K2.0 (Commentary). It is difficult to describe the District Court's reasoning and the Circuit Court's endorsement of that reasoning as anything but dissatisfaction with the available sentencing range.

The Circuit Court erred in stating that "the departure made Blackley's sentence more closely approximate what would follow for kindred crimes committed by high government officials under provisions such as § 2C1.2 itself," the gratuity guideline. Appendix A, 19a. The indictment did not allege that Mr. Blackley received a gratuity. He was not charged with receiving a gratuity. Moreover, there was no evidence presented at trial demonstrating that Mr. Blackley received a gratuity by failing to report certain monies on his 1993 SF 278 Form.

As this Court recently held in *United States v. Sun-Diamond Growers of California*, 119 S. Ct. 1402 (1999), "in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific "official act" for or because of which it was given." *Id.* at 1411. There was no allegation that Mr. Blackley's receipt of certain monies from farmers who received subsidies from the USDA was for or because of a specific "official act." The allegations were solely related to Mr. Blackley's failure to report approximately $22,000 on his 1993 SF 278 Form and later statements to inspectors general concerning his receipt of monies in 1993. More importantly, there is nothing in the

sentencing guidelines as a whole, or in U.S.S.G. § 2F1.1 in particular, that required or encouraged the sentencing court to "more approximate a kindred crime" when that supposedly "kindred" crime was not at issue and was not charged. Appendix A, 19a.

Following this Court's determination that the language of the statutory gratuities provision should be interpreted to be a "scalpel" rather than a "meat axe," this Court should avoid applying the gratuities guideline, U.S.S.G. § 2C1.2, to unrelated crimes, such as the false statements statute involved in this case. *Sun-Diamond*, 119 S. Ct. at 1410. To allow otherwise would be contrary to this Court's holdings and the Sentencing Commission's mandate to draft guidelines that govern the courts' sentencing of defendants in a way that is uniform and avoids discrimination in sentencing.

IV. The Sentencing Court's Eight Level Upward Departure Increasing Mr. Blackley's Sentence for False Statements Offenses Under the Fraud Guidelines from Possible Probation to 27-Months Imprisonment When There Was No Monetary Loss and No Charge or Proof of an Illegal Gratuity is Unreasonable Under This Court's Decisions in Williams v. United States, 503 U.S. 193 (1992), and United States v. Sun-Diamond, 119 S. Ct. 1402 (1999).

The Circuit Court acknowledged that "at first blush the number of levels seems high" in this case. Appendix A, 19a. The Circuit Court went on to state, however, that "the departure made Blackley's sentence more closely approximate what would follow for kindred crimes committed by high government officials under provisions such as § 2C1.2 itself." *Id.* Because § 2C1.2 relates to receiving a gratuity, a crime for which Mr. Blackley was neither charged nor convicted, and a crime which is not similar to Mr. Blackley's actions, the upward departure is unreasonable.

Receiving a gratuity is not a "kindred" crime to making a false statement and the Circuit decision provides no reason to believe as much.[5] The indictment and evidence did not link the receipt of money by Mr. Blackley with any official action on his part. Further, the indictment and evidence fail to allege or show what the payments represented, if anything. Because the indictment and evidence were devoid of these basic requirements for a gratuities violation, the fraud guidelines are without question the most applicable to the offense charged. *See Sun-Diamond*, 119 S. Ct. 1402.

A few Circuit Courts have approved of sentencing courts examining analogous sentencing guidelines in measuring the extent of a departure, once the sentencing court decides that a departure is warranted because the circumstances take the matter outside of the "heartland" of the sentencing guidelines. *See, e.g., United States v. Horton*, 98 F.3d 313, 317 (7th Cir. 1996). The sentencing courts must be careful, however, to ensure that the analogy selected is an appropriate one. *United States v. Leahy*, 169 F.3d 433, 445 (7th Cir. 1999). For example, the Seventh Circuit in *Horton*, held that the sentencing court's analogy to § 2A6.1(b)(1), the guideline that applies to threatening communications accompanied by "conduct indicating that the defendant intends to carry out such threat," for its upward departure of eight levels was unreasonable when the defendant pled guilty to making a bomb threat against a federal building one day after the bombing of the Alfred P. Murrah Building in Oklahoma City. 98 F.3d at 318.

The *Horton* Court reasoned that for such an analogy to apply, the defendant must have engaged in conduct beyond the

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[5] "Kindred" is defined as "having a similar or related origin, nature, or character." Webster's II New Riverside University Dictionary (1994).

bounds of making an empty threat because § 2A6.1(b)(1) required the defendant to take some action that demonstrated his willingness to carry out his threat. 98 F.3d at 318-19. The same is true here. Any analogy to the gratuities guideline is misplaced because there was no allegation and no evidence that Mr. Blackley received any monies for or because of any "official act." *See Sun-Diamond*, 119 S.Ct. 1402. *See also Leahy*, 169 F.3d at 446-48 (upward departure of ten levels was unreasonable because sentencing court analogized to inappropriate guideline).

Under these circumstances, the upward departure of eight levels violates the reasonableness standard set forth by this Court in *Williams*, 503 U.S. 193. Reasonableness must be assessed in light of the factors under the guidelines as well as the reasons provided for the sentence in question by the district court. *See Dyce*, 91 F.3d at 1465-67. In this case, the District Court stated that the eight level upward departure was based upon Mr. Blackley's position as a high level government official. Increasing a sentence from a possible period of probation to incarceration for 27-months on this basis is entirely unreasonable. *See United States v. Davis*, 170 F.3d 617, 629-31 (6th Cir. 1999) (upward departure of four levels for telemarketing fraud was unreasonable under guideline for extreme conduct or based on the number of victims).

Unreasonableness is demonstrated by reviewing the adjustments and departures permitted for offenses where the conduct involved is far more egregious than in this case. For example, U.S.S.G. § 3B1.1 provides for a *two level* increase for abuse of position of trust. The District Court's statements seem to be equating Mr. Blackley's conduct with such an act. Yet, the Sentencing Commission viewed the act as only increasing the level by two, while the District Court increased by eight, four times as severe. This is unreasonable on its

face. *See also* § 2Q1.2(b)(1) ("If the use or the threat of force against any person was involved, increase by five levels."); § 2N1.1(b)(1)(B) ("If any victim sustained serious bodily injury, increase by two levels.").

The fraud guidelines themselves identify a wide variety of serious conduct that warrants increases in an offense level, but none rises to anywhere near the level of the upward departure in this case. *See, e.g.*, U.S.S.G. § 2F1.1(b)(3) ("If the offense involved a misrepresentation that the defendant was acting on behalf of a charitable, educational, . . . organization . . . increase by *two levels.*"); § 2F1.1(b)(4)(A) ("If the offense involved (A) the conscious or reckless risk of serious bodily injury, or (B) possession of a dangerous weapon [ ] in connection with the offense, increase by *2 levels.*"). Further, to warrant an eight level upward departure under § 2F1.1(b)(1)(I), the loss to the victim would have to amount to more than $200,000. In this case there was no monetary loss.

For these reasons, the District of Columbia Circuit's opinion affirming the lower court's upward departure should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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June 28, 1999